U.S. Ecology Corporation *and* Oil, Chemical & Atomic Workers International Union, AFL–CIO. Cases 10–CA–30847 and 10–CA–31149

May 23, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On May 13, 1999, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions, as modified, and to adopt the recommended Order, as modified and set forth in full below.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of its employees' strike activities. The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) by engaging in bad faith and surface bargaining, bypassing the Union and dealing directly with unit employees concerning terms and conditions of employment, implementing its final proposal without first bargaining in good faith to impasse, and unilaterally changing its employment procedures by posting bidding notices for "as needed" positions. The judge found that the Respondent had engaged in each of the unlawful acts alleged. The Respondent has excepted to all of the violations found.

We affirm the judge's finding that the Respondent engaged in unlawful surveillance, and created the impression of surveillance, for the reasons discussed in his decision. For the reasons set forth below, we also affirm his findings that the Respondent violated Section 8(a)(5) by engaging in surface bargaining, implementing the terms of its final offer, and making unilateral changes. However, we shall reverse the judge's finding that the Respondent engaged in unlawful direct dealing with unit employees.

1. *Surface Bargaining*. As the judge discussed in detail, the Respondent and the Union engaged in lengthy, but ultimately fruitless, negotiations for a collective-bargaining agreement to succeed their contract which was scheduled to expire February 9, 1998.[1] The Respondent contended, and still contends, that straitened financial circumstances required it to seek concessions from the Union. Accordingly, its initial economic proposal, made on January 15, included wage increases of only 10 cents per year for 3 years, compared to 55 cents as provided in the last year of the expiring contract; the elimination of a $1 wage premium for some 26 employees in certain classifications; and sizable increases in the health insurance premiums paid by employees. Under the existing contract, a single employee paid premiums of about $10 per month, and an employee with a family of four paid about $40. Under the Respondent's proposal, those premiums would have risen to about $20 and $200, respectively.

On February 9, the Respondent modified its proposal. Under the new proposal, the lowest starting wage rate would be reduced from $9.70 under the old contract to $7.50. There would be a wage increase of 40 cents the first year of the contract[2] but no further increases in the second and third years, and the $1 wage premium would be retained. Health insurance premiums paid by employees would be about $33 per week, or $132 per month, for a family of four. That proposal was rejected by the employees on February 9. The Respondent further modified its proposal later that day to provide for a wage increase of 75 cents in the first year of the contract and to reduce employees' health insurance premiums by 26 cents, but again to eliminate the $1 wage premium.[3] The Respondent also agreed to retain the "validity" provision of the old contract, under which any successor employer would be bound by the terms of the contract. The employees also rejected this proposal and went on strike February 10.

During the strike, on February 23, the Respondent proposed a freeze on wages, elimination of the $1 wage premium, and increasing the length of time required to progress to the top of the pay scale from 18 months to 5 years. It also proposed to increase the premium for family health coverage from 33 cents (under its February 9 offers) to $46.15 per week. Further, the Respondent withdrew its earlier agreement to retain the "validity" provision of the expired contract. The Union rejected this proposal.

By letter dated February 26, the Union made an unconditional offer on behalf of the employees to return to work, and the employees returned to work on March 2. The parties held two additional negotiating sessions. On March 2, the Respondent repeated its February 23 proposal, as modified to allow it to subcontract bargaining unit work whenever the Respondent deemed it practicable to do so.[4] The Union rejected this proposal.

On March 4, the Union offered several concessions. Specifically, the Union agreed, inter alia, to the changes in the employees' vacation rights which the Respondent had proposed and to the previously proposed $33 weekly premium for family health coverage provided that dental coverage was included. However, the Respondent announced that it had no more "moves" to make, and that if the Union did not accept its proposal, the parties were at impasse and

[1] All dates refer to 1998.

[2] The judge inadvertently stated that the proposal was for a first-year 40-cent wage "freeze." He also found, incorrectly, that the Respondent's proposal would have reduced the starting wage rate for radwaste techs. We correct these errors.

[3] Both the 40- and 75-cent increases offered on February 9 were only for employees with at least 18 months' service, not, as the judge indicated, for all unit employees.

[4] The judge inadvertently stated that the Respondent's March 2 offer included weekly employee health insurance premiums of $43.15 for family coverage; in fact, the proposal was for weekly premiums of $46.15, as in the Respondent's February 23 proposal.

the Respondent would implement its final offer. The union representative denied that an impasse existed, stating that the Union had more "moves" that it could make. He did not specify what those "moves" were, however. The Respondent informed the Union on March 5 that it was implementing its last offer.

The judge credited witness testimony to the effect that the Respondent had no intention of reaching a contract with the Union. According to the testimony of Union Vice President Mike Alley, about 2 weeks after the end of the strike, Walt Kritsky, the Respondent's nuclear equipment service center director and negotiating team member, told him that Plant Manager Dave Grayewski and Employee Relations Manager Vicki Hicks told Kritsky that there would be no contract no matter what the Union did, and that the Respondent wanted to "force us out in the hopes that we would bust ourselves," so that it could hire employees at $7 to $7.50 an hour. Alley's wife Cheryl, an employee of the Respondent, testified without rebuttal that, a week before the strike, her supervisor, John Knox, told her that Grayewski said that he wanted to hire employees to work for $7 to $8. Knox asked why Grayewski did not do it, and Grayewski answered that he had to wait for the Union to "bust" itself.

The judge found that the Respondent had engaged in regressive bargaining. He noted that, on economic issues, the Respondent had proposed a lower starting wage rate, smaller wage increases (or wage freezes), elimination of the $1 wage premium for designated employees, and an extension from 18 months to 5 years of the time required to advance to the top wage rate. It had also proposed significant increases in the health insurance premiums paid by employees. Equally significant in the judge's eyes were the Respondent's withdrawal from its earlier agreement to retain the "validity" clause that would bind a successor employer to the terms of the contract, and the Respondent's proposal to expand its authority to subcontract unit work. Those proposals, the judge found, would have eliminated any contractual protection of the unit employees' jobs.

The judge also found that much of the record evidence contradicted the Respondent's claim that its financial situation forced it to seek concessions from the Union. The judge further noted that financial distress does not excuse an employer's unlawful refusal to bargain, and found that the Respondent's evidence in this regard therefore had no relevance.[5]

Thus, although the parties reached agreement on some issues and the Respondent made limited concessions, the judge concluded that the Respondent had engaged in unlawful surface bargaining—i.e., that it had no intention of reaching a final agreement with the Union. He found that the Respondent's bargaining proposals were so regressive that it could not reasonably have expected the Union to agree to them. He also noted that the Respondent had rejected numerous concessions offered by the Union. The judge further found that, during the strike, the Respondent engaged in unlawful surveillance and in direct dealing with unit employees. Finally, the judge relied on the statements of company officers that there would be no contract no matter what the Union did and that the Respondent wanted to wait for the Union to "bust" itself so that the Respondent could hire replacement employees at $7.50 to $8 (as it did during the strike).

In its exceptions, the Respondent reiterates its contention that its proposals were based on economic necessity. It argues that it did make concessions, and that the less palatable (to the Union) proposals it made in the latter stages of bargaining were justified by changed conditions. The Respondent further contends that the judge should not have relied on the Alleys' testimony concerning statements purportedly made by its managers, which it contends are hearsay. The Respondent also argues that it did not engage in unlawful surveillance or direct dealing, and therefore, that the judge erred in relying on those findings in deciding the surface bargaining issue. Finally, the Respondent contends that, even if it did engage in unlawful surveillance, that action had nothing to do with the negotiations, and therefore, should not be considered in deciding whether a lawful impasse had been reached. As explained below, we find merit only in the Respondent's contention that it did not engage in unlawful direct dealing with its employees.[6]

The duty to bargain in good faith, and the limits on that duty, were summarized by the Board in *Atlanta Hilton & Tower*:[7]

> Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement," but "the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position." The employer is, nonetheless, "obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if Section

[5] We disavow the latter statement, at least insofar as it suggests that an employer cannot base its bargaining proposals on economic considerations.

[6] For the reasons discussed in part 2 below, we find, contrary to the judge, that the Respondent did not engage in unlawful direct dealing with employees. We therefore do not rely on the alleged direct dealing in finding that the Respondent engaged in surface bargaining. Nor do we rely on the fact that the Respondent engaged in surveillance and created the impression of surveillance. Although that conduct was unlawful, we agree with the Respondent that it did not adversely affect the bargaining process.

[7] 271 NLRB 1600, 1603 (1984).

8(a)(5) is to be read as imposing any substantial obligation at all." [Citations omitted.]

Surface bargaining, which is alleged here, is the antithesis of good-faith bargaining. It consists of employing the forms of collective bargaining without any intention of concluding an agreement.[8]

In order to determine whether a party has bargained in good faith, it is necessary to examine its overall conduct, both at the bargaining table and away from it.[9] Here, we must decide, on the basis of the Respondent's entire course of dealing, whether it was lawfully engaged in hard bargaining in an attempt to reach a contract it considered desirable, or whether it merely went through the motions of collective bargaining without any intention of entering into a collective-bargaining agreement.[10] We have examined the totality of the Respondent's conduct, and we agree with the judge that the Respondent engaged in surface bargaining. We reach that result, however, only for the following reasons.

We rely principally on the credited testimony of Mike Alley. As noted above, Alley testified that, according to Nuclear Equipment Service Center Director Kritsky, Plant Manager Grayewski, and Employee Relations Manager Hicks stated that there would be no contract regardless of what the Union did, and that the Respondent wanted to "force us out in the hopes that we would bust ourselves," so that it could hire employees at lower wages than prevailed under its contract with the Union. Such statements strongly suggest that the Respondent had no desire to conclude a contract with the Union, but instead was hoping that, as a result of fruitless negotiations, the Union would be ousted as the employees' representative and the Respondent could reduce wages without dealing with the Union.

The Respondent contends that Alley's testimony was inadmissible hearsay, rather than admissions of a party-opponent, because Alley was "twice removed" from the person who purportedly made the statement. We find no merit in that contention. To begin with, Alley's testimony in this regard was received without objection; consequently, the Respondent's hearsay argument concerning his testimony has been waived.[11] In any event, the statements about which Alley testified were made by the Respondent's plant manager and employee relations manager, who was a member of the Respondent's negotiating team, to Kritsky, who was also a member of the Respondent's negotiating team, and who repeated them to Alley. We find it irrelevant for purposes of the hearsay rule that the statements were not made directly to Alley because, as statements made by and to individuals who were clearly agents of the Respondent, they were party admissions. Accordingly, we find that Alley's testimony was properly admitted.[12]

We also agree with the judge that the Respondent engaged in regressive bargaining. In this regard, we rely in particular on the Respondent's February 23 proposals for a 3-year wage freeze for its longest-tenured employees and a nearly threefold increase in the length of time to advance to the top pay level, and on its March 2 proposal to broaden its authority to subcontract unit work. None of those proposals had been made previously. We also rely on the Respondent's February 23 proposals to increase, in comparison with its previous offer, the portion of health insurance premiums to be paid by employees, and to withdraw from its agreement to retain the "validity" provision of the expired contract. All of those proposals were significantly worse, from the Union's standpoint, than the Respondent's February 9 offers.[13]

Regressive bargaining, however, is not unlawful in itself; rather, it is unlawful if it is for the purpose of frustrating the possibility of agreement.[14] And, as the Respondent rightly observes, an employer who offers less attractive proposals after weathering a strike than it did before the strike will not necessarily be found to have engaged in surface bargaining. If economic conditions have changed, or the employer finds itself in a stronger bargaining position after the strike, an offer of regressive proposals will not necessarily indicate an intention to frustrate the bar-

[8] See, e.g., *Houston County Electric Cooperative*, 285 NLRB 1213, 1215 (1987).

[9] *Atlanta Hilton & Tower*, 271 NLRB at 1603; and *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991).

[10] *Texas Coca-Cola Bottling Co.,* 146 NLRB 420, 429 (1964), enfd. 365 F.2d 321 (5th Cir. 1966).

[11] *Iron Workers Local 46*, 320 NLRB 982 fn. 1 (1996), enf. denied on other grounds 149 F.3d 93 (2d Cir. 1998).

[12] See *In re Sunset Bay Associates*, 944 F.2d 1503, 1517–1519 (9th Cir. 1991).

Under Rule 801(d)(2)(D), Fed. R. Evid., a statement by a party's agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, and offered against the party, is not hearsay, but an admission of the party. We recognize that, as the judge also found, Cheryl Alley's supervisor, Knox, told her that Grayewski said that he was waiting for the Union to "bust" itself so that he could bring in employees at lower wages. There is no record evidence, however, on which to base a finding that Knox was an agent of the Respondent, and we are unwilling to make such a finding simply because Ms. Alley described Knox as a supervisor. Accordingly, we do not rely on Cheryl Alley's testimony in this regard, which, in any event, is cumulative of that of her husband.

The Respondent also argues that the judge erred in ignoring Hicks' testimony that she did not take part in any conversations with or without Grayewski about busting the Union or avoiding reaching a contract, and that she did not hear Grayewski make any such statement. We find that, in crediting Mike Alley on this point, the judge implicitly discredited Hicks. Concerning Grayewski, even if Hicks had been credited, her testimony would only establish that she was not present when Grayewski made the statements attributed to him by Mike Alley, not that Grayewski did not make the statements at all. Consequently, Mike Alley's testimony regarding Grayewski's statements is effectively unrebutted.

[13] We do not rely, however, on the Respondent's consistent proposals of small wage increases and increased employee health insurance premiums. Even if the Respondent's claims of financial distress were overstated, as the judge found, those proposals in and of themselves amounted to no more than permissible hard bargaining.

[14] See, e.g., *McAllister Bros*., 312 NLRB 1121 (1993).

gaining process.[15] The Respondent contends that it withdrew its earlier agreement to retain the "validity" provision of the expired contract because it was contemplating selling the business and felt that a prospective purchaser should not be obligated to honor the collective-bargaining agreement. It also argues that it withdrew its previous subcontracting proposal because it wanted to be able to subcontract instrument calibration functions in order to save money.

Under other circumstances, we might find such arguments persuasive. In this case, however, the testimony of Mike Alley wholly undercuts the Respondent's explanations. Alley credibly testified that the Respondent's managers proclaimed that there would be no contract no matter what the Union did, and that they wanted the Union to "bust" itself so that new employees could be hired at lower wage rates. In light of that testimony, we infer that the Respondent offered the regressive proposals discussed above in order to ensure that, in fact, no contract would be concluded. That is the very essence of unlawful surface bargaining.[16] We therefore agree with the judge that the Respondent bargained in bad faith, in violation of Section 8(a)(5).

Because we find that the Respondent did not bargain in good faith, we agree with the judge that no valid impasse existed, and therefore that the Respondent further violated Section 8(a)(5) by implementing the terms of its final offer without the Union's consent.[17]

2. *Direct Dealing*. Beginning about February 25, during the strike, the Respondent sent letters to employees assertedly responding to strikers' questions. Hicks testified that the letters were sent because supervisors told her that employees were asking about returning to work. The letters informed the employees that they could return to work and "for the time being" receive the same wages and benefits that had prevailed before the strike. The letter also stated that the Respondent intended to hire permanent replacements for employees who remained on strike. Mike Alley testified that the letter was not sent to the Union. The terms set forth in the letter were better than any the Respondent had offered the Union. On February 26, the Union sent the Respondent a letter offering on behalf of the employees to return to work under the conditions stated in the Respondent's letter. The Respondent replied that the employees should report to work on March 2, and they did.

The General Counsel alleged that, in sending the letters, the Respondent violated Section 8(a)(5) by bypassing the Union and dealing directly with the employees.[18] The judge agreed. He found that the Respondent's communication to employees was likely to erode the Union's position as the employees' bargaining representative.[19] He noted the Respondent's argument, which it repeats in its exceptions, that it was required to maintain the existing terms and conditions of employment because it had not bargained to impasse, and that it was entitled to inform employees of that fact. The judge rejected that argument, however, because the Respondent had stated its position directly to the employees instead of to the Union. He also found that the letter contained a threat that striking employees would lose their jobs if permanent replacements were hired.

The Respondent has excepted to the judge's findings. It argues again that, by informing the employees that, if they returned to work, they would receive the same wages and benefits they had enjoyed before the strike, it did no more than state the terms it was legally obliged to offer until the parties had either bargained to impasse or concluded a new collective-bargaining agreement. Accordingly, the Respondent contends, it should not be found to have attempted to erode the Union's position as the employees' exclusive representative.

We find merit in the Respondent's exception. As the judge correctly observed, when the Board is deciding whether an employer has engaged in unlawful direct dealing, "the question is whether [the] employer's direct solicitation of employee sentiment over working conditions is likely to erode 'the Union's position as exclusive representative.'"[20] Contrary to the judge, we do not find any such likelihood here.

To begin with, the evidence indicates that the Respondent did not initiate these communications, but instead sent its letter in response to employees' questions.[21] And, as the Respondent correctly argues, it could not lawfully offer the striking employees any terms other than those that prevailed before the strike, because the parties had not bargained to impasse or reached a new contract.[22] We do not believe that, merely by stating (in response to employee inquiries) the only employment conditions it could lawfully offer under the circumstances, the Respondent can reasonably be found to have "eroded the Union's position as exclusive representative."[23] The General Counsel

[15] See, *Barry-Wehmiller Co.*, 271 NLRB 471 (1984); and *Hickenbotham Bros.*, 254 NLRB 96, 102 (1981).

[16] See *Overnite Transportation Co.*, 296 NLRB at 671. Contrary to our dissenting colleague, we find that the Respondent made its regressive proposals not because it had weathered the strike, but rather to preclude reaching a contract.

[17] *Benjamin F. Wininger & Son*, 286 NLRB 1177, 1181–1182 (1987).

[18] See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

[19] *Allied-Signal, Inc.*, 307 NLRB 752, 753 (1992), quoting *Modern Merchandising*, 284 NLRB 1377, 1379 (1987) (other citations omitted).

[20] Id.

[21] Hicks so testified, and the General Counsel did not challenge her testimony.

[22] *NLRB v. Katz*, 369 U. S. 736 (1962); *Capitol-Husting Co.*, 252 NLRB 43, 45 (1980), enfd. 671 F.2d 237 (7th Cir. 1982).

[23] The judge relied on *Central Management Co.*, 314 NLRB 763, 767 (1994), in which the Board found that the employer engaged in unlawful direct dealing by offering employees a continuation of most existing employment terms, when it had made different proposals to the union. We find that case materially distinguishable, however. In *Central Management Co.*, the employer offered more favorable terms to the

has not argued that anything else in the letter would support a finding of direct dealing.[24] We therefore find that the Respondent did not engage in unlawful direct dealing, and we shall dismiss this allegation of the complaint.

3. *Unilateral Changes.* About July 30, the Respondent posted notices of several "as needed" positions. The Union filed a grievance, which the Respondent denied on the basis that it had been doing the same thing for years with the Union's agreement and that it had not violated the implemented terms of the Respondent's final offer. The complaint alleges that the posting of the "as needed" positions, without notice to or consultation with the Union, violated Section 8(a)(5).

The judge found the violation. He noted that the expired contract required the Respondent to post a notice for any vacancy not caused by vacation, sick leave, or absenteeism. The judge found that, with only one exception (a vacancy caused by a Q-A inspector's taking 2 weeks leave for National Guard training), the Respondent had never negotiated with the Union about filling "as needed" positions and had never posted such vacancies.[25] He found that the Respondent had not demonstrated that it had a prior practice of posting vacancies for "as needed" positions. Accordingly, the judge found that the posting of the "as needed" positions in July 1998, without first consulting with the Union, was a unilateral change in terms and conditions of employment that violated Section 8(a)(5).

In its exceptions, the Respondent contends that the posting of the "as needed" positions is a matter of contract interpretation that is already the subject of a grievance that can be resolved through arbitration. The Respondent also argues that the implemented terms of its final proposal do not differ in any material way from those of the expired contract as applied to the job bidding procedure.[26] Accordingly, the Respondent urges, this issue is appropriate for deferral to arbitration under the principles of *Collyer Insulated Wire*.[27]

We find no merit in the Respondent's deferral argument. The Board will not defer complaint allegations to arbitration if the employer has manifested hostility to the principles of collective bargaining.[28] We have found that the Respondent engaged in bad-faith surface bargaining, with an intention to avoid reaching a contract. By this conduct, the Respondent has rejected the principles of collective bargaining. In these circumstances, we find that deferral to arbitration would be inappropriate.

Turning to the merits of the allegation, we affirm the judge's finding of an unlawful unilateral change in terms and conditions of employment. The complaint alleges that the Respondent "implemented a change in its employment procedures by posting job bidding advertisements for 'as needed' positions," although the conduct actually complained of seems to have been the creation of the "as needed" positions, not the mere act of posting.[29] Thus, the Union's grievance alleged that "There are no provisions in the final offer implemented on March 7[,] 1998 for 'As Needed' positions nor was [sic] there any proposals for as Needed positions during negotiations." Mike Alley testified that "There is [sic] no as needed jobs at the facility."

In denying the grievance, the Respondent explained that

> The positions of QA Inspector, Stocker, Janitor, Respiratory Tech., and Laundry Tech. are positions which are filled by only one person. The positions require training before the employees can perform their job duties. The "as-needed position" provides for an employee to receive training and orientation in the position before being assigned to the position. When the employee currently filling [one of the above named positions] is absent, an employee who has been trained in that position can be transferred into the position and is immediately able to start performing the job duties. There is no disruption or slow down of operations caused by having to train someone who has had no experience in the position.

Thus, it appears that, by creating the "as needed" positions, the Respondent established a small number of jobs which it would fill with a cadre of individuals who would be trained in advance to fill certain positions as they became temporarily vacant. When the latter positions did become temporarily vacant, they would be filled by those "as needed" individuals instead of being filled, through the normal posting and bidding process, by applicants who might have to be trained. Although the new approach would seem to have merit from the standpoint of efficiency, it nevertheless represented a change from existing

employees *on the condition that they abandon the union*. As the Board noted, "such an attempt to deal with the employees was intended to undermine the Union as the employees' exclusive bargaining representative." Id. No such quid pro quo offer is alleged or evident here. We also agree with the Respondent that *Allied-Signal* and *Modern Merchandising* are materially distinguishable from this case.

[24] In particular, the complaint does not allege, and the General Counsel did not argue in his posthearing brief to the judge, that the Respondent's reference to hiring permanent replacements for employees who continued to strike was either independently unlawful or contributed to the alleged direct dealing.

[25] Although Hicks testified that the Respondent had filled other "as needed" positions besides that for the Q-A inspector, she did not dispute Mike Alley's testimony that the Respondent never posted any such vacancies and did not negotiate with the Union about them.

[26] As the final offer was unlawfully implemented, the Respondent's reliance on its terms is, of course, without merit.

[27] 192 NLRB 837 (1971).

[28] See, e.g., *Kenosha Auto Transport Corp.*, 302 NLRB 888 (1991).

[29] Indeed, the physical posting of the positions appears to have been consistent with the terms of the expired contract.

Our dissenting colleague contends that we are finding a violation that was not alleged in the complaint. We find no merit in this contention. The complaint can reasonably be read as encompassing the Respondent's unilateral conduct with respect to the "as needed" positions, and the specific violation that we find was fully litigated at the hearing.

practice,[30] and therefore, could not lawfully be implemented without affording the Union notice of the proposed change and an opportunity to bargain.[31] We therefore affirm the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally creating the "as needed" positions.

AMENDED REMEDY

Having found that the Respondent did not engage in direct dealing with employees, we shall delete from the judge's recommended Order the provision related to that allegation. We shall add to the recommended Order and notice an affirmative remedy for the unilateral creation of "as needed" positions. We further note that the judge included in his recommended Remedy the payment of interest on any contributions the Respondent failed to make into the employees' pension fund. Because the provisions of employee benefit fund agreements are variable and complex, the Board leaves to the compliance stage of unfair labor practice proceedings the question of what interest payments must be made in order for the employees to be made whole for an employer's unlawful conduct.[32] We shall, therefore, delete the references to interest payments on the pension contributions from the recommended Remedy, with the understanding that those matters may be raised at compliance.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, U.S. Ecology Corporation, Oak Ridge, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance of its employees' union activities, or creating the impression of such surveillance.

(b) Engaging in bad faith and surface bargaining with Oil, Chemical & Atomic Workers International Union, AFL–CIO (the Union).

(c) Implementing the terms of its final offer without first either obtaining the Union's agreement or bargaining in good faith to a valid impasse.

(d) Unilaterally changing its employment procedures regarding employment of as-needed employees without first affording the Union an opportunity to bargain concerning the proposed change.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order, restore all bargaining unit employees to the wages and benefits they received under the expired collective-bargaining agreement.

(b) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees, laboratory, health physics, yard, survey, radwaste, water treatment, lab assistants, production assistants or aides, Nuclear Equipment Service Center assistants, and shipping and receiving employees at the Nuclear Materials Management Center (including those employees described above who are assigned to the Nuclear Equipment Service Center) who are on the Nuclear Materials Management Center payroll, excluding all office and clerical employees, technical, professional and sales employees, foremen, watchmen, guards, and supervisors as defined in the National Labor Relations Act, as amended.

(c) Rescind the posting of "as needed" positions.

(d) Reimburse all unit employees, with interest, for the losses of wages and benefits they incurred as a result of the Respondent's unfair labor practices, in the manner set forth in the administrative law judge's decision, and for its failure to make required contributions on their behalf to the pension fund, in the manner set forth in the judge's decision as modified by the Board.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of make-whole relief due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Oak Ridge, Tennessee facility, copies of the attached no-

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[30] Neither the job posting provisions of the expired contract nor the Respondent's (unlawfully) implemented final offer refer to "as needed" positions.

The Union's agreement to a one-time posting of a vacancy for the Q-A inspector position on an "as needed" basis did not establish a practice that the Respondent was entitled to continue without negotiating with the Union. Nor did it operate as a waiver of the union's right to bargain over such changes in the future. The Board does not lightly infer waivers of statutory rights. To find a waiver of a union's right to bargain over changes in terms and conditions of employment not contained in a collective-bargaining agreement, the Board must find that the matter at issue was fully discussed and consciously explored during negotiations and that the union consciously yielded or clearly and unmistakably waived its interest in the matter. See, e.g., *Owens-Corning Fiberglas*, 282 NLRB 609 and fn. 2 (1987). None of those conditions has been met in this case.

[31] Id.

[32] *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). We shall also order the Respondent to reimburse unit employees for any expenses ensuing from the Respondent's failure to make pension fund contributions, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 fn.2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981, with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

tice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 5, 1998.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting in part.

Unlike my colleagues, I do not find that the Respondent bargained in bad faith. As an initial matter, I note that there is some common ground between my colleagues and me on the issue of bad-faith bargaining. Thus, I agree with my colleagues' disavowal of the judge's statement that the Respondent's evidence regarding financial distress was irrelevant, at least insofar as it suggests that an employer cannot base its bargaining proposals on economic considerations. I agree with my colleagues that the bad-faith (or surface) bargaining issue should be analyzed without reference to either the direct dealing allegations (which we dismiss) or the Respondent's unlawful surveillance. I agree with my colleagues' decision not to rely on Cheryl Alley's testimony for purposes of analyzing this issue. And, I agree with their nonreliance on the Respondent's proposals on wage increases and health insurance premiums, and with their description of those proposals as no more than permissible hard bargaining.

My colleagues' finding that the Respondent engaged in surface bargaining is based principally on the testimony of Union vice president Mike Alley. Alley testified to statements allegedly made to him by Kritsky (Nuclear Energy Service Center Manager) concerning statements allegedly made to Kritsky by Plant Manager Grayewski and Personnel Manager Hicks. Kritsky and Hicks were on Respondent's negotiating team. Thus, the alleged statements were twice removed from Alley. In brief, the statements attributed to Grayewski and Hicks were that there would be no contract no matter what the Union did, and that the Respondent wanted to force the Union out in the hope that the Union would "bust itself" and the Respondent could then hire employees at $7 to $7.50 per hour.

The Respondent contends that this testimony is inadmissible hearsay evidence. My colleagues reject this argument, in part because the testimony was received without objection, and in part because the statements at issue were made by and to the Respondent's agents and were therefore party admissions.

However, even assuming arguendo that my colleagues are correct on this point, it speaks only to the admissibility of Alley's testimony, not to the weight that should be accorded it. In this regard, I note that the reliance placed by my colleagues on this testimony is very heavy indeed. My colleagues even concede that they rely "principally" on Alley's testimony as to the surface bargaining allegation. They also concede that regressive bargaining is not unlawful in itself and that an employer who offers less attractive proposals, after weathering a strike, does not thereby necessarily indicate an intention to frustrate the bargaining process. My colleagues also do not quarrel with the Respondent's contentions that it withdrew its earlier agreement to retain the "validity" provision of the expired contract because it was considering selling the business and felt a prospective purchaser should not be obligated to honor the collective-bargaining agreement.[1] Nor do my colleagues quarrel with Respondent's contention that it withdrew its previous subcontracting proposal because it wanted to be able to subcontract instrument calibration functions in order to save money. They state that in other circumstances they might find such arguments persuasive. However, because of Alley's testimony, they reject the Respondent's explanations.

In my view, this analysis places too heavy a burden on Alley's attenuated reports of statements allegedly made by officials of the Respondent, even assuming that Alley's testimony on this issue was properly admitted. In reaching this conclusion, I emphasize, inter alia, the *Atlanta Hilton & Tower*[2] language, cited by my colleagues, to the effect that the obligation to bargain in good faith does not compel either party to agree to a proposal or require the making of a concession, and that the Board cannot force an employer to make a concession on any specific issue or to adopt any particular position. I also note that Respondent, even though not required to do so, made significant concessions on February 9. Respondent's proposal was rejected, and a strike began on February 10. Although Respondent's proposal became more stringent in some respects on February 23, this was because it was successfully weathering the strike. As my colleagues concede, a party can take advantage of its economic strength, or the other party's economic weakness.

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] The "validity" provision stated that any successor employer would be bound by the terms of the contract.

[2] 271 NLRB 1600 (1984).

In sum, because I am unwilling to place as much reliance as my colleagues do on Alley's testimony, I find that testimony an insufficient basis on which to conclude that the Respondent bargained in bad faith. I therefore, also, disagree with my colleagues' findings that no valid impasse existed and the Respondent therefore further violated Section 8(a)(5) by implementing its final offer. These findings are premised on the finding that the Respondent did not bargain in good faith.

Finally, I do not find unlawful the Respondent's actions in connection with the "as needed" positions. As an initial matter, I note that the violation found by my colleagues is not the violation alleged by the General Counsel. Thus, the complaint alleged that the Respondent implemented a change in its employment procedures by *posting* job bidding advertisements for "as needed" positions. By contrast, the violation found by my colleagues seems to be the Respondent's *creation* of the "as needed" positions and its intent to fill those vacancies from a cadre of individuals who would be trained in advance. Indeed, my colleagues note that the *posting* of the positions was consistent with the terms of the expired contract.

My colleagues argue, inter alia, that the complaint can reasonably be read as encompassing the violation that they find. The complaint alleges that the Respondent implemented a change in its employment procedures by simply *posting* job bidding advertisements for "as needed" positions. The violation that is found is said to be the *creation* of the positions at issue and their *filling* from a newly created cadre. Thus, I do not believe that the complaint encompasses the violation.

In any event, my colleagues reject the Respondent's *Collyer*[3] deferral argument because they find that the Respondent has rejected the principles of collective bargaining by engaging in bad-faith surface bargaining. However, as discussed above, I do not find that the Respondent engaged in that conduct. Therefore, I do not join in my colleagues' rejection of the Respondent's deferral argument.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT engage in surveillance of our employees' union activities, or create the impression of such surveillance.

WE WILL NOT engage in bad faith and surface bargaining with Oil, Chemical & Atomic Workers International Union, AFL–CIO (the Union).

WE WILL NOT implement the terms of our final offer without first either obtaining the Union's agreement or bargaining in good faith to a valid impasse.

WE WILL NOT unilaterally change our employment procedures regarding employment of as-needed employees without first affording the Union an opportunity to bargain concerning the proposed change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of the Board's Order, restore all bargaining unit employees to the wages and benefits they received under the expired collective-bargaining agreement.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees, laboratory, health physics, yard, survey, radwaste, water treatment, lab assistants, production assistants or aides, Nuclear Equipment Service Center assistants, and shipping and receiving employees at the Nuclear Materials Management Center (including those employees described above who are assigned to the Nuclear Equipment Service Center) who are on the Nuclear Materials Management Center payroll, excluding all office and clerical employees, technical, professional and sales employees, foremen, watchmen, guards, and supervisors as defined in the National Labor Relations Act, as amended.

WE WILL rescind the posting of "as needed" positions.

WE WILL reimburse all unit employees, with interest, for the losses of wages and benefits they incurred as a result of our unfair labor practices, in the manner set forth in the administrative law judge's decision, and for our failure to make required contributions on their behalf to the pension fund, in the manner set forth in the judge's decision as modified by the Board.

U.S. ECOLOGY CORPORATION

Katherine Chahrouri, Esq., for the General Counsel.
Lawrence S. Wescott, Esq., and *Jonathan Sills, Esq. (Serotte, Rockman, & Wescott, P.A.),* for the Respondent.

[3] *Collyer Insulated Wire*, 192 NLRB 837 (1971).

John Williams, International Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN**,** Administrative Law Judge**.** The original charge in Case 10–CA–30847 was filed by Oil, Chemical & Atomic Workers International Union, AFL–CIO (the Union) on March 3, 1998,[1] and an amended charge on May 29. The Union filed the charge in Case 10–CA–31149 on August 14. Complaint issued on November 25, and alleges that Respondent engaged in surveillance of the union's strike headquarters by remote videotape camera, in violation of Section 8(a)(1) of the Act. The complaint further alleges that Respondent violated Section 8(a)(5) by engaging in bad-faith and surface bargaining, by bypassing the Union and dealing directly with employees concerning terms and conditions of employment, by implementing its final offer in contract negotiations without the agreement of the Union and in the context of its unlawful surveillance and direct dealing with employees, and by unilaterally implementing a change in its employment procedures by posting job bidding advertisements for "as needed" positions.

This case was heard before me in Oak Ridge, Tennessee, on January 21 and 22, 1999. Thereafter, the General Counsel and Respondent filed briefs. On all the evidence of record, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with an office and place of business located at Oak Ridge, Tennessee, where it is engaged in the manufacture of nuclear products. During the 12 months preceding issuance of the complaint, Respondent purchased and received at its Oak Ridge, Tennessee facility goods and materials valued in excess of $50,000 directly from points outside the State of Tennessee. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Collective-Bargaining Agreement (CBA) and the Prestrike Bargaining for a New Contract

The Oak Ridge facility was previously owned by Quadrex Environmental Co., and was acquired by Respondent in 1994. As indicated, the parties on February 9, 1996, entered into a CBA ending 2 years later. The parties held several bargaining sessions from January 5 until February 9, at which time the existing contract expired and the Union engaged in a strike. Further bargaining sessions were held thereafter.

1. The bargaining sessions on January 13 and 14

The parties met initially on January 5, but merely discussed dates for bargaining sessions. There was a session on January 13 at which the Company's principal spokesman and attorney, Lawrence S. Wescott, appeared for the first time. According to Union Vice President Mike Alley, Wescott read company proposals and union proposals,[3] and rejected most of the latter, saying "We have a proposal on that."

Wescott testified that he told the union representatives that the Respondent was in "very bad financial shape," and needed "concessions" from the Union. Thus, the Company wanted to increase the employee's premium for health insurance, install a "short term" disability plan, limit the number of unexcused absences, reduce the amount of payment for unused sick leave, eliminate the fifth week of vacation, and "freeze" the Company's five-percent contribution to the employee pension fund. The Company was in "dire financial straits . . . and the costs under the collective bargaining agreement were excessive." There would not be any "large" wage increases.

The Company presented its first economic proposals on January 14. Under the existing contract, the employees had "short term disability" benefits. These were payable for 13 weeks at either two-thirds or full pay depending on length of service. Thus, an employee with less than 1-year service received 1 out of 13 weeks at full pay, and 12 at two-third's pay. However, with increased service the employee received additional weeks of full pay so that employees with 12 years of service received the entire 13 weeks at full pay.[4]

The substitute plan offered by the Company on January 15 provided for a maximum of two-third's pay regardless of length of service, with a cap of $2000 per week, and requirements for "proof" of disability.[5]

2. The wage and insurance proposals on January 15

The existing contract set forth the hourly wage rates for different classifications of employees for 1996 and 1997. The rates for each classification increased with length of service. Within each classification and length of service, the increase from 1996 to 1997 was 55 cents per hour.[6]

In addition, the existing CBA provided for $1 hourly premiums for three classifications of employees—supercompactor operators, departmental aides in operations, and employees with required certifications and licenses.[7] There were about 26 of these employees.

The Company presented a wage proposal on January 15. The parties were then in the last month of the old contract. Whereas the Company had increased each rate by 55 cents per year from 1996 to 1997, it proposed for most employees a new rate in 1998 of 10 cents more than the existing rate, and 10-cent increases for the next 2 years.[8] The rate for the radwaste tech was unaccountably reduced from $11.05 in January 1998, to $10.45 in

[1] All dates are in 1998 unless otherwise indicated.

[2] This fact is established by the testimony of union representatives Mike Alley and John Williams, and by a collective-bargaining agreement entered into by the parties on February 9, 1996, and ending on February 9, 1998, Jt. Exh. 1.

[3] The Union presented a proposal.

[4] Jt. Exh. 1, p. 52.

[5] Jt. Exh. 23.

[6] As examples, starting with employees with 0 to 6 months of service, a support tech went from $9.15 in 1996 to $9.70 in 1997, a process tech from $10.10 to $10.65, a radwaste tech from $10.50 to $11.05, and a maintenance tech from $10.45 to $11. The same pattern of a 55-cent annual increase was followed with respect to employees with longer lengths of service. Jt. Exh. 1, p. 38.

[7] Ibid., p. 37.

[8] Starting again with employees with 0 to 6 months of service, the February 1998 rate for support tech was $9.80, for a process tech $10.75, and for a maintenance tech $11.10. The same 10-cent increase was followed with employees in the higher service categories. Jt. Exh. 3, "Wage System for Union Employees."

February.[9] In addition, the 1-dollar premium for designated employees was eliminated.[10]

The Company also proposed a health insurance plan. The existing CBA provided for weekly payment by employees of $2.50, with an additional $2.50 for each family member up to three individuals.[11] An individual thus paid about $10 per month and a family of four individuals including the employee paid about $40 monthly.

The Company proposed on January 15 that the premium for an individual would be $10 biweekly, or about $20 monthly, $60 biweekly for the employee plus one individual, $80 for the employee plus two individuals, and $100 biweekly for the employee plus three or more individuals or about $200 per month.[12]

The Union rejected these proposals. The Company later proposed another insurance plan, discussed hereinafter.

On January 22, the parties reached tentative agreements on job bidding, and recall from layoff.[13] However, they still disagreed on a wide variety of issues. These included sick leave, no-strike/no-lockout provisions, the supply clerk classification, shift differentials, funeral leave, entry level qualifications, the code of conduct, and holiday pay. On the latter issue, the parties disputed the meaning of the existing CBA.[14] The CBA provided that employees would receive double-time pay for work performed on holidays.[15] It also provided that the rate for overtime work was one-and one-half the amount of the regular rate (with some exceptions).[16] There was extensive argument over this issue.[17]

3. The final bargaining sessions before the strike

There was a session on January 27 which was attended by a Federal mediator at the Company's invitation. According to Wescott, the Company offered to let union auditors examine its books, but the Union declined. Union Vice President Alley attended sessions on January 27, 28, and 29. There was agreement on job bidding and work-related inquiries. On February 2 there was discussion about plant safety, and a radiological safety expert addressed the employees. The Company wanted to defer bargaining during the latter part of February 3, in order to work on their "final offer," to be presented the next day.

Alley testified that the parties met again on February 4. The Company showed wage scales on slides. It did present a "final offer," but the proposal did not have any wage rates or an insurance package. A copy of this proposal is in evidence, dated February 4. It states that the wage rates are set forth in "Exhibit 'A.'" However, there is no "Exhibit A." Although there is a page entitled "Benefit Plans and Insurance," there is no insurance proposal.[18]

The union committee examined the proposal and found two other errors in it, i.e., language contrary to the agreement of the parties. The committee presented the proposal to the union membership that afternoon, and it was rejected.

The next day, according to Alley, the Company was surprised at the errors, which it called "typos," and asked for time off for the rest of the day to revise the proposal. The parties met again on February 6, and the Company presented a revised proposal. The Union told the Company that, if they wanted an agreement, they would have to start considering the Union's proposals.

On February 7, a Saturday, the parties met briefly, and the Company wanted until Monday to present another "final offer."

The Company returned on February 9 with the same offer it had made on February 4, with two exceptions. The starting rate on wages was reduced to $7.50.[19] As indicated, the lowest beginning wage in 1997 under the old CBA was $9.70.[20] There was a "forty (40) cent per hour freeze in the first year and a freeze in the second and third years."[21] The 1-dollar premium for 26 designated employees was restored. The Company also proposed a new insurance plan under a new carrier, in which the family rate would be $33 weekly, or about $132 monthly. The Union accepted this provided it included dental coverage. However, the union membership rejected the entire proposal at about 6:30 p.m. on February 9.

The Company was notified of the membership action, and then proposed changes in its offer. It would again remove the $1 premium for the 26 designated employees, but would increase the beginning wage of $7.50 in the first year by 75 cents, with wages still frozen for the second and third years. It would reduce health benefits premiums by 26 cents, and give 3 days' notice of layoffs.

The union membership also rejected this proposal, and, as the CBA expired on February 9, went out on strike at 12:01 a.m. on February 10.

B. The Picketing and Alleged Surveillance

1. Summary of the evidence

The plant is bounded on its northwest side by Flint Road. There are two entrances to the plant at the northwest corner. The east side of the plant is bounded by Franklin Road, and there is an entrance to the plant on that street.[22] The Union established a strike headquarters across the street from the northwest corner, and maintained three picketing stations, one each at the two front entrances, and one at the Franklin Road entrance.[23]

One of the buildings on the northwest corner of the plant (Building A) had two cameras on it. The right hand camera normally was turned to face the yard area behind the building. The

[9] Ibid.
[10] Ibid.
[11] Jt. Exh. 1, p. 24.
[12] Jt. Exh. 4.
[13] Jt. Exhs. 5, 5(a), 6.
[14] Art. VI of the existing CBA concerns overtime and premium pay. Sec. 2, entitled "No Pyramiding," reads as follows:

> Overtime and/or premium pay shall not be pyramided.
>
> When more than one (1) overtime and/or premium pay provision is applicable to the same hours worked, only the highest single premium payment will be paid. All continuously worked hours shall be paid at the appropriate overtime rate. Hours that are paid under one (1) provision shall not be used again for the purpose of computing any other overtime or and/or premium payment, except as herein specifically provided in the following instances:
>
> A.. Hours worked on a holiday, as part of an employee's regular schedule, shall be counted as hours worked for the purpose of computing overtime. Jt. Exh. 1, p. 10.

[15] Jt. Exh. 1, p. 12.
[16] Ibid. , p. 11.
[17] The Union's position was that an employee working 8 hours on a holiday received his double overtime rate at twice the regular rate, but that if he worked more than 8 hours on a holiday, this was overtime at time and a half, based on his double-time rate. The Company, in such instances, argued that he dropped back to straight double time.
[18] Jt. Exh. 9.
[19] Testimony of Company Attorney Wescott.
[20] Supra., fn. 6
[21] Testimony of Company Attorney Wescott.
[22] GC Exh. 2.
[23] Ibid.

camera on the left hand corner of building A normally faced the parking lot in front of the building. The other building (building C) had one camera normally pointed westward toward the "other parking lot."[24] There is a large parking area to the left of building C, on the west side of the plant.[25] I conclude that this is "other" parking lot referred to by Alley.

Respondent employed Burns Security service prior to the strike. When it began, the Company also employed a firm called "Strike Consultants," headed by Robert Reed. He testified that his guards videotaped various activities, on receipt of authority from plant manager Grayewski that the guards could do so whenever it was "necessary." Accordingly, Reed's guards engaged in filming. The videotapes are in evidence, and show individuals stopping in front of strike headquarters with the pictures zooming in on the faces of individuals, and license plates.[26] Reed contended that a picket said an employee attempted to injure him. This incident was filmed, and Reed gave it to the police. They reported, according to Reed, that they "couldn't see nothing on the film, and left it at that." A car raced through a grassy area where pickets were standing, 2 days before the end of the strike.

Employee Calvin Dykes was a picket, and took photographs of guards videotaping the pickets. One photograph, Dykes explained, shows a guard cutting limbs out of a tree to make the pickets visible. Another is a photograph of a fixed security camera pointing across the street, not at the parking lot.[27]

Reed also operated the fixed security cameras on occasion. He testified that he would move the camera so that it covered the front of the building, including the picket line. Reed denied that there was any film in the camera.

2. Factual conclusions

Respondent argues that the guard company was not given specific instructions to film the pickets.[28] However, its owner was given discretion to do so. The Company also argues that it was easy for the Company to tell who was walking the picket line, since it and the strike headquarters were only 50 feet away. The issue is not whether the Company could have ascertained these facts without cameras. The issue is whether they videotaped the pickets and the strike headquarters, using hand-held videotaping equipment, and changed the direction of their fixed cameras on the building so as to focus on the pickets and the strike headquarters. The evidence concerning the hand-held video equipment is conclusive. Although Reed testified that the fixed cameras did not have film, this seems dubious—they were, after all, "cameras." In any event, empty or loaded with film, they were altered so as to point at the pickets and the strike headquarters. The employees had no way of knowing what was in them.

C. The Midstrike Bargaining Session

The parties met on February 23 at the intercession of the mediator. The Union proposed that the employees work under the terms of the old CBA, except for what had already been agreed on by the parties. The Union agreed to work for 1 year without any wage increase, and further agreed to increase its insurance premiums by 25 percent. The Union also agreed to freeze the Company's retirement fund contributions for one year. Respondent rejected this proposal.

The Company proposed a freeze on wages, deleting the one-dollar premium pay for selected employees, and increasing the length of time to reach the top of a pay scale from 18 to 60 months. Respondent also proposed to increase the family coverage insurance premium from its last offer of $33 weekly with dental insurance to $46.15 without dental insurance. The Company also proposed to withdraw its prior agreement to the "validity" clause, by which a successor would be bound by the terms of any new CBA.[29]

The Union rejected this proposal, but counter-offered with a proposed 1-year agreement wherein it relinquished demands for an educational plan, health club membership, a clothing allowance, and automobile mileage reimbursement. The existing contract would remain in effect except where changes had been agreed on, and employees would increase their insurance contributions by 25 percent. The Union agreed that the Company could stop paying into the pension fund for 1 year, provided that it agreed at that time to put the employees into another pension plan. Respondent rejected this offer.

D. Respondent's Alleged Direct Dealing With Employees

Beginning about February 25, Respondent sent letters to employees in answer to asserted "questions raised by striking employees." The letter stated that the employees could return to work and receive the same wages and benefits as before the strike, "for the time being." The letter stated that the Company intended to hire permanent replacements for employees who continued to strike.[30] Employee Relations Manager Vicki Hicks testified that supervisors told her that employees were calling about returning to work, and that this was the reason for the letter.

Union Vice President Alley testified that this letter was not sent to the Union, that the Company had never offered these terms to the Union, and that they were better than anything the Company had offered to the Union. On February 26 the Union sent a letter to the Company stating that the employees agreed to return to work "under the conditions, wages and benefits enjoyed prior to going on strike, as set forth in the terms of your attached letter referenced above."[31] The Company replied that the employees should report for work at 7 a.m. on March 2.[32] The employees did so.

E. The Final Two Bargaining Sessions

The parties met again on March 2, the date the employees returned to work. The Company reiterated its prior plan, which had a wage freeze, a family insurance package at $43.15 weekly without dental coverage, and a 5-year progression for reaching the top wage rate. In addition, the Company proposed a new subcontracting article which would give it the right to subcontract bargaining work whenever the Company deemed it practical. In response, the Union offered to work under the existing contract for 18 months, but the Company rejected this.

The parties met for the last time on March 4. The Union agreed to management-rights language for which the Company had asked. The Union also agreed to add a janitor to the list of unit employees in return for the Company's adding a stocker. The Union consented to reduce the amount of service time which would earn vacation rights, thus, reducing the latter. It also

[24] Testimony of Union Vice President Alley.
[25] GC Exh. 2.
[26] Jt. Exhs. 22, 41.
[27] GC Exhs. 5, 6.
[28] R. Br., 21.
[29] Jt. Exh. 1, p. 35.
[30] Jt. Exh. 14.
[31] Jt. Exh. 15.
[32] Jt. Exh. 16.

agreed to family insurance at $33 weekly provided that dental coverage was included. In addition, as previously indicated, the Union relinquished health plan membership, car mileage reimbursement, a scholarship program, and a clothing allowance.

The Company agreed to give 1 week's notice of a layoff. Company Attorney Wescott said that the Company had no more "moves," and that if the Union did not accept it, they were at impasse and would implement their last offer. Union Representative John Williams denied that they were at impasse, said that the Union had more "moves" to make, and that the Company was refusing to bargain. On March 5, the Company wrote to the Union that it was implementing its last offer.[33]

Union Vice President Alley testified that, about 2 weeks after the employees returned from strike, Walt Kritsky, Respondent's nuclear energy service center manager and a member of the Company's negotiating team, told Alley that Plant Manager Grayewski and Employee Relations Manager Hicks had told Kritsky that there would be no contract no matter what the Union did. The Company wanted to "force the Union out" so they could hire employees at $7 to $7.50 per hour. Kritsky testified that he could not remember making this statement. He was an evasive witness, and I credit Alley's testimony on this issue.

Cheryl Alley (wife of Mike Alley), a 9-year employee, testified that about a week before the strike, her supervisor, John Knox, told her that Plant Manager Grayewski said he wanted to bring employees in to work for $7 to $8 hourly. Knox asked Grayewski why he did not do it, and the plant manager replied that he had to wait for the Union to "bust" itself. The Company in fact hired strike replacements at about this wage rate during the strike. I credit Cheryl Alley's unrebutted testimony.

F. The Alleged Change in Employment Procedures by Unilateral Posting of "As Needed" Positions

This issue involves the short-term availability of a job because of the temporary absence of the regular employee. In late July, the Company posted notices of several "as needed" positions.[34] The Union filed a grievance. The Company denied it on the ground that it had been doing this for years, with the Union's agreement, and that it had not violated the implemented final offer.[35]

Union Vice President Alley testified that, about 2-1/2 years prior to these events, a Q-A inspector had to leave for 2 weeks for National Guard training, and the Union allowed the Company to fill in for him. This was a one-person position, and the Company had to train a replacement. Employee Relations Manager Vicki Hicks corroborated this testimony. She also contended that other "as needed" positions were "filled" by the Company—a Q-A inspector position, another one during a layoff in 1997, and a super compactor and an aid position. Alley testified that the only "as needed" position about which the Company negotiated was the Q-A inspector position for the National Guard employee, and that it never posted "as needed" positions prior to the postings involved in this proceeding. The expired CBA required the Company to post a notice with respect to any vacancy not caused by vacation, sick leave, or absenteeism.[36]

Although the Company may have "filled" other as-needed positions, according to Hicks, Alley's testimony that it never negotiated with the Union about this (except for the National Guard employee), and never posted such vacancies, is unrebutted. There is no evidence that the Union had any knowledge of any as needed vacancies except for the one involving the National Guard employee. If the Company filled other as-needed positions without notifying the Union, then, it simply engaged in unlawful unilateral conduct. This evidence is insufficient to establish that the Company had a prior practice of unilaterally posting vacancies for as-needed positions.

G. Legal Conclusion

1. The alleged electronic surveillance

The Board has stated: "[I]t is well established that, absent legitimate justification, an employer's photographing of its employees while they are engaged in protected concerted activity constitutes unlawful surveillance (authorities cited)." *United States Steel Corp.,* 255 NLRB 1338 (1981). Many of the cases involving this issue have dealt with the question of legitimate justification. In *United States Steel Corp.*, the Board concluded that "purely anticipatory photographing of peaceful picketing in the event something (might) happen does not justify (an employer's) conduct when balanced against the tendency of that conduct to interfere with the employees' right to engage in concerted activity." (Ibid.)

In the case at bar, there were two sets of cameras, the fixed security cameras, and hand-held video equipment. With respect to the former, the direction of the cameras was changed so as to cover the front of the building including the picket line. A photograph of one of these security cameras shows it pointed across the street (at the strike headquarters). The limbs of a tree are cut so as the make pickets visible to guards holding video equipment.

Respondent cites *Lucky 7 Limousine*, 312 NLRB 770 (1993). In that case the employer began photographing the pickets after the strike had begun, for the purpose of obtaining a restraining order against employee misconduct (id., 312 NLRB at 808). The administrative law judge concluded that the employer was "seeking to preserve evidence of arguable picket line misconduct, to be used to obtain an injunction against picket line activities." (Id., 312 NLRB at 808.) Such an injunction in fact was sought and obtained. In addition, the ALJ stated that the General Counsel engaged in a "misleading characterization of the facts" (id.).

Respondent also cites *Horsehead Resource Development Co. v. NLRB*, 154 F.3d 328 (6th Cir. 1998) enfg. in part and denying in part 321 NLRB 1404 (1996). In that case the Board found that the employer locked out the employees, installed a video camera at the plant gate, and utilized video equipment photographing pickets 50 to 75 feet off company property. The Board held this to be unlawful surveillance. The court concluded that this finding was appropriate to the extent that the surveillance "went beyond videotaping the access to the front gate, the plant perimeter and the company cars . . . . The surveillance of union members who were in no way engaged with company personnel or property but were merely talking among themselves or moving to and from the picket shack and the portable restroom, was unjustified," the court stated (id., 154 F.3d 341).

In the case at bar, the evidence shows that Respondent videotaped the faces of employees stopping near the strike headquarters, and their license plates. It altered the direction of the fixed security cameras so as to cover the strike headquarters. There is no evidence of picket misconduct, nor any effort by Respondent to obtain an injunction. The only matter which attracted Respondent's attention was an alleged assault by an employee on a

[33] Jt. Exh. 20.
[34] Q-A Inspector, Support Tech. GC Exh. 4.
[35] GC Exh. 5.
[36] Jt. Exh. 1, p. 15.

picket, not any misconduct by the latter—an incident which the police dismissed.

I conclude that this constituted surveillance and an impression of surveillance violative of Section 8(a)(1).

2. The surface bargaining allegation

a. Applicable principles

In an early case, the Court of Appeals for the First Circuit stated:

> The ultimate issue whether the Company conducted its bargaining negotiations in good faith involves a finding of motive or state of mind which can only be inferred from circumstantial evidence. It is similar to an inquiry whether an employer discharged an employee for union activity.[37]

A good-faith state of mind has been described as "a desire to reach ultimate agreement to enter into a collective-bargaining contract[38] "a willingness to negotiate toward the possibility of effecting compromise,"[39] a "willingness among the parties to discuss freely and fully their respective claims and demands, and, when these are opposed, to justify them on reason,"[40] and "the serious intent to adjust differences and to reach an acceptable common ground."[41] Good faith "requires more than a willingness to enter upon a sterile discussion of union-management differences," yet does not require the yielding of positions fairly maintained."[42] Good faith is not satisfied by a party's willingness to "enter into a contract of his own composition."[43] "Sometimes, the only indicia of bad faith may be the proposals advanced and adhered to."[44]

b. Summary of the bargaining

The parties negotiated numerous issues, and it is important to concentrate on those which were the most significant. On the key issue of wages, the Company initially proposed to raise wages by 10 cents in 1998, compared to the 1996–1997 raise of 55 cents, and to eliminate a 1-dollar hourly premium for selected employees. It later proposed an extension of the time it would take an employee to reach the top rate, from 18 to 60 months. On February 9, the Company reduced its starting wage offer to $7.50, with a 40-cent increase offered for the first year, and a wage freeze for 2 more years. In the last bargaining session, the Company proposed to increase the first-year raise to 75 cents, but again deleted the $1 premium to designated employees.

At the same time that it was reducing wages, the Company was proposing increased insurance costs. The existing plan of about $40 monthly for family coverage went up to about $200, with lesser but proportionate increases for families with fewer members. The Company later changed this to a new plan under a different carrier, which would involve a family coverage for about $132 monthly. The reduction of the 1997 starting time rate of $9.70,[45] plus the increased insurance cost, was more than the first year 75-cent wage raise, and resulted in a net loss to employees. The employee's time to reach his top rate was stretched out to 5 years.

Of equal significance was the preservation of employee jobs. The Company's proposals would have eliminated any protection of this nature. It withdrew a prior agreement to continue binding a successor to the terms of a new contract, and thus, left it free to sell the Company without any obligation by the buyer to adhere to the contract. It also proposed, at the very end of the bargaining, that it have the right to subcontract unit work whenever it considered this to be practical. Under these two provisions, Respondent could either eliminate unit work while retaining the Company, or sell the Company to a third party with the incentive that the latter would not be obligated to honor the protections to employees embodied in the contract.

Respondent at times made various proposals which it termed concessions—to restrict it from exercising its management rights in an arbitrary or discriminating matter, to modifications in the no strike/no lockout language, to an increase in shift differential pay for temporarily transferred employees, to an increase of one floating holiday, and increased time for employees bidding on new jobs to go back to their old jobs. Concerning these purported "concessions," Union Representative John Williams testified, "Not one of them was worth a penny to the guy out there working." Considering the limited impact of these proposals compared to the unit-wide proposals I agree with Williams' assessment.

At the same time, the Company rejected the Union's concessions–to work for 1 year without a wage increase and freeze retirement benefits for 1 year, to give up health club membership, an employee scholarship program, and clothing and meal allowances, to pay increased health insurance premiums and reduce vacation benefits.

The totality of the evidence on the negotiating sessions warrants a conclusion that Respondent engaged in regressive bargaining.

c. The alleged direct dealing

It is undisputed that Respondent, during the strike, sent a letter to employees stating that they could return to work and receive the same wages and benefits they had received before the strike, "for the time being." The letter also stated that the Company intended to hire permanent replacements for strikers who continued to strike. It is also undisputed that the Company did not make any such offer to the union representatives, and that the offer was better than anything the Company had offered to the Union.

The Board has stated:

> It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that an employer who deals directly with its unionized employees or with a representative other than the designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(5) and (1) (authority cited). Direct dealing need not take the form of actual bargaining. As the Board made clear in *Modern Merchandising*, 284 NLRB 1377, 1379, (1987), the question is whether an employer's direct solicitation of employee sentiment over working condition is likely to "erode the Un-

[37] *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 139–140 (1st Cir. 1953).

[38] *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960).

[39] *Associated Gen. Contr. of AM, Evansville Chap. v. NLRB*, 465 F.2d 327, 335 (7th Cir. 1972).

[40] *NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32, 37 (3d Cir. 1941).

[41] *Wal-Lite Div. of U.S. Gypsum Co.*, 200 NLRB 1098, 1101 (1972), enf. denied 484 F.2d 108 (8th Cir. 1973).

[42] *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

[43] *Wal-Lite Div. of U.S. Gypsum Co*., supra, fn. 41.

[44] *NLRB v. Wright Motors*, 603 F.2d 604, 609 (7th Cir. 1979).

[45] For a support tech with 0 to 6 months of service, supra, fn. 6.

> ion's position as exclusive representative (authorities cited)." [*Allied Signal*, 307 NLRB 752, 753 (1992).][46]

Respondent argues that it was obligated under *NLRB v. Katz*, 369 U.S. 736, 743–748 (1961), to continue the same terms and conditions of employment until it reached an impasse in negotiations, and that it was "certainly within its rights" to notify employees of this fact.[47] The trouble with this argument is that Respondent said it directly to the employees, and not to their designated bargaining representative. As the Board stated in *Central Management Co.*, supra:

> [W]e find that the Respondent, through its supervisors' activities, also violated Section 8(a)(5) and (1) of the Act by bypassing the Union in an attempt to deal directly with the employees. Between the first and second bargaining sessions, the Respondent's supervisors, in soliciting the employees to abandon the Union, offered the employees a continuation of the existing terms and conditions of employment, except for pension benefits. In contrast, during the first bargaining session, the Respondent made different proposals to the Union, including a wage freeze and a reduction in staff. [314 NLRB at 765, 767.]

In addition to the likelihood that this direct dealing would erode the Union's position as the exclusive representative, the letter contained a threat of loss of employment (by the hiring of replacement employees) by all employees who continued to strike. I conclude that Respondent, by its aforesaid letters, violated Section 8(a)(5) and (1).

d. Respondent's economic defense

Respondent submitted evidence of what it called its "dire financial situation" in defense of the positions which it took during bargaining. Thus, it submitted income statements purporting to show over $987 million in losses during the first quarter of 1998.[48] Corporate Controller Gary Davis testified that the Company had disposed of nonperforming assets, had shut down facilities, had reduced staff, and that nonunion employees at Oak Ridge had not had any raises for 3 years.

On the other hand, Davis admitted on cross-examination that Respondent's purchase of Quadrex in 1995 resulted in a write-off of $20 million, and that the Company's financial condition had improved. He further admitted that the Company's performance for the first quarter of 1998 was the best first quarter it had had since 1994. On May 1, Respondent's vice president and chief accounting officer, Robert S. Thorn, issued a press release stating that the Company's first quarter for 1998 was its best since 1994. Attached to this release was a purported financial statement showing net income before taxes of $67,000 for the first quarter, net loss to preferred stockholders of $73,000, and net loss to common shareholders of $183,000.[49] Respondent's comment on this document is that Respondent was "trying to enhance morale among the employees."[50] In November, Respondent's chairman, Jack K. Lemley, announced a refinancing of the Company (with Chase Bank) reducing its long term debt from $41 million to $1 million.[51] In January, when the Company was allegedly suffering enormous losses, it purchased a new structural steel blasting machine worth $100,000, and issued a statement that this would significantly improve its performance.[52] Employee Relations director Vicki Hicks testified that she received an $8000 annual raise at the end of the strike, and that other managers also received raises and promotions.

In light of the evidence contradicting explicitly or implicitly the financial statements submitted by Respondent, I place little credence in them. In any event, Respondent's evidence has no relevance inasmuch as the Board has repeatedly held that an employer's claimed financial distress is no defense to charges that it unlawfully refused to bargain.[53]

e. Conclusion on the surface bargaining allegation

At the outset of negotiations, the Company announced that it needed "concessions" from the Union on virtually every aspect of employee benefits. In its brief, Respondent argues that the existing contract was "a most generous agreement, far more than the Respondent could afford."[54] The Company's proposals during bargaining were regressive to the point that it could not reasonably have expected agreement from the Union. Respondent rejected numerous concessions from the Union. During the strike, the Company engaged in unlawful surveillance of its employees' union activities, and unlawfully bypassed the employees' bargaining representative by making a direct offer to the employees to return at existing wages and benefits – something it had never offered the Union. A Company officer told a union representative that the plant manager said there would never be a contract no matter what the Union did, since the Company wanted to force the Union out. Another employee testified that a company officer said that it wanted to hire employees at $7.50 to $8.00 and "bust" the Union. The Company in fact hired replacement employees at these rates.

I conclude on the entire record that the Company had no intention of reaching any final agreement with the Union. Accordingly, it engaged in bad-faith and surface bargaining in violation of Section 8(a)(5) and (1) of the Act.

f. The alleged impasse and Respondent's unilateral implementation of its final offer

At the last bargaining session, on March 4, the Union agreed to a change in the management-rights language requested by the Company, to a reduction in vacation rights, and to increased insurance payments provided that dental care was included. It continued to relinquish health club membership, a scholarship program, and meal allowances. The Company agreed to give 1 week's notice of a layoff. The Company said it had no more "moves" to make, and that the parties were at impasse. The Union disputed this, said that it had more "moves" to make, and that the Company was refusing to bargain. On the next day, March 5, the Company sent a letter to employees announcing the implementation of the terms in its last offer, to be an effective March 7, the insurance on March 15.

The burden of proof that an impasse exists lies with the party asserting it.[55] In *Francis J. Fisher, Inc.*, 289 NLRB 815 (1987),

[46] See also *Central Management Co.*, 314 NLRB 763, 767 (1994).
[47] R. Br. 43.
[48] R. Exhs. 8, 9, 10.
[49] GC Exh. 8.
[50] R. Br. 23.
[51] GC Exh. 7.
[52] GC Exh. 9; testimony of Alley.
[53] *Hankins Lumber Co.*, 316 NLRB 837 (1995); *Northampton Nursing Home*, 317 NLRB 600 (1995); *Kane Systems Corp.*, 315 NLRB 355 (1994); *Compu-Net Communications*, 315 NLRB 216 (1994); and *Mercy Hospital*, 311 NLRB 869 (1993).
[54] R. Br. 24.
[55] *CJC Holdings*, 320 NLRB 1041 (1996); *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992); *Taft Broadcasting Co.,* 163 NLRB 475 (1967).

the administrative law judge listed a series of facts suggesting that "the negotiations may have been practically doomed before they began." Nonetheless, "although obtaining an agreement . . . would have been quite difficult," the administrative law judge declined to find that an impasse existed (id., pp. 820–821).

In the case at bar, difficulties not comparable in magnitude to those in *Francis J. Fisher* existed. The Union had made numerous and substantial concessions to the Company, and it is by no means certain that it would not have gone further to final agreement. Respondent argues that, although the Union announced at the last session that it itself had more "moves," it did not announce any. However, the Union had no time to do so, since the Company immediately posted a letter to employees announcing the implementation of the new terms. I conclude that Respondent has not met its burden of establishing an impasse.

Further, the Company had engaged in unlawful surveillance of the Union's activities, and unlawfully bypassed the Union in its offer to the employees during the strike. It is established law that an employer may not validly claim an impasse in the context of its own unfair labor practices. *Great Southern Fire Protection*, 325 NLRB 9 (1997); "A party cannot parlay an impasse resulting from its own misconduct into a license to make unilateral changes." *Wayne's Dairy*, 223 NLRB 260, 265 (1976). I conclude that the argument that there was an impasse justifying Respondent's conduct is without merit, and that Respondent violated Section 8(a)(5) and (1) by unilaterally implementing its last contract offer without the consent of the Union.

g. The alleged unilateral posting of advertisements for as-needed positions

The evidence shows that the Company posted advertisements of as-needed positions without prior consultation with the Union. The Supreme Court has held that "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate . . . " *NLRB v. Katz*, 369 U.S. 736, 743 (1961). It is clear, and I find, that the Respondent's unilateral posting of the as-needed positions constituted an unlawful refusal to bargain.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. The Respondent, U.S. Ecology Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Oil, Chemical & Atomic Workers International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in surveillance of its employees' union activities, and by creating an impression of such surveillance Respondent violated Section 8(a)(1) of the Act.

4. All production and maintenance employees, including laboratory technicians, employed by Respondent at its Flint Road, Oak Ridge, Tennessee facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

5. Respondent violated Section 8(a)(5) and (1) of the Act by engaging in the following conduct:

(a) Since about January 5, 1998, engaging in bad-faith and surface bargaining with the Union;

(b) On about February 24, 1998, bypassing the Union and dealing directly with the employees of the unit described above regarding terms and conditions of employment;

(c) On about March 5, 1998, without the consent of the Union, implementing its final offer in negotiations in the context of the foregoing unfair labor practices;

(d) On about July 30, 1998, unilaterally changing its employment procedures regarding the employment of as-needed employees, without consultation with the Union.

6. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

It having been found that Respondent has engaged in unfair labor practices, it will be recommended that it be ordered to cease and desist therefrom, and to take certain affirmative action to effectuate the policies of the Act.

Inasmuch as it has been found that Respondent failed to bargain in good faith, it is recommended that it be ordered to do so on request. Since Respondent unlawfully implemented its final offer on March 5, 1998, and thus, reduced employee wages, it is recommended that the employees be made whole with interest. The amount of backpay due each employee shall equal the difference between their pay as calculated using the wage rate in the expired agreement and the amount they actually received for the period beginning March 5, 1998, and ending on the date Respondent restores the appropriate wage rate. The appropriate method for determining backpay is specified in *Ogle Protection Services*, 183 NLRB 682, 683 (1970). The interest shall be determined as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)**.** In addition, Respondent shall make its employees whole for any charges for insurance which it made exceeding those which it had previously made, plus interest. To the extent that Respondent may have discontinued contributions to pension funds, it shall be required to pay into such funds the amounts which it failed to make, plus interest. Respondent shall be required to restore all prior employee benefits.

[Recommended Order omitted from publication.]